TS SAMBANTHAMURTHI

v.

AJ DASON & ORS

HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN YUNUS J
[CIVIL SUIT NO: F370-84]
25 MAY 2005

CONTRACT: *Damages - Breach - Assessment - Appeal against - Damages awarded based on losses suffered resulting from breach of a revocation agreement between parties - Whether revocation agreement invalid and unenforceable*

CONTRACT: *Damages - Interest - Assessment - Appeal against - Damages awarded based on losses suffered resulting from breach of a revocation agreement between parties - Whether revocation agreement invalid and unenforceable*

CIVIL LAW ACT: *Damages - Interest, award - Assessment - Appeal against - Damages awarded based on losses suffered resulting from breach of a revocation agreement between parties - Whether revocation agreement invalid and unenforceable*

This was an appeal by the plaintiff against the following award made by the senior assistant registrar ('registrar') for assessment of damages in favour of the 5th defendant against the plaintiff: (i) as damages for breach of contract, the plaintiff shall pay to the 5th defendant a sum of RM265,000, being the refund of a deposit paid to and received by the plaintiff, and a further sum of RM400,000, being the increment in value of the subject property; (ii) in accordance with s. 11 of the Civil Law Act 1956, interest was awarded at 6% per annum on the total sum of the above damages assessed from the date of assessment until the date of realisation; and (iii) costs of the assessment. The plaintiff appealed against the whole decision while the 5th defendant, dissatisfied with that part of the decision pertaining to interest, appealed in relation to that aspect. It was the finding of the High Court at the trial, and upheld on appeal by the Court of Appeal, that the plaintiff had breached a contract entered into between the plaintiff and the 5th defendant ('revocation agreement'). The damages awarded by the registrar were in respect of losses suffered by the 5th defendant as a result of breach of the revocation agreement

by the plaintiff. The plaintiff contended that the registrar had erred and that the assessment could not be based on the revocation agreement because the Court of Appeal had made a finding that the revocation agreement was invalid and unenforceable. The plaintiff relied on the following words in the judgment of the Court of Appeal: 'It is clear to this court that as the revocation agreement is no longer valid and enforceable … '.

Held (dismissing the plaintiff's appeal; allowing the 5th defendant's appeal):

(1) There must have been a mistake in the aforementioned words, in particular, the words 'revocation agreement'. From the tenor of the Court of Appeal judgment as a whole, what the Court of Appeal meant to refer to was the sale and purchase agreement entered into between the plaintiff and the 5th defendant for the land in question, and not the revocation agreement. It did not make any sense for the Court of Appeal, on the one hand, to say that the revocation agreement was valid and to agree with the High Court's finding that there had been a breach of the revocation agreement by the plaintiff and that there should be an assessment of damages in respect of the breach, and yet at the same time to say, on the other hand, that 'the revocation agreement is no longer valid and enforceable'. The Court of Appeal could not be said to have indulged in self-contradiction. There must have been a slip of the pen by the learned Court of Appeal judge when writing the judgment. As to the award of the sum of RM265,000, the registrar was clearly correct in law in awarding this sum to the 5th defendant. This sum was the deposit that had been paid by the 5th defendant to the plaintiff under the sale and purchase agreement, which under the revocation agreement was to be refunded to the 5th defendant. The sum of RM400,000 was also correctly awarded by the registrar for this sum was also stipulated in the revocation agreement as being the sum that the 5th defendant would be entitled to receive from the plaintiff had the land been sold to one Koperasi Belia Majujaya ('KBM') at RM3,300,000. The 5th defendant's case was fortified by the evidence of the professional property valuer involved, who said that the market price of the land at the time that KBM offered to buy it was RM3.3 million. The 5th defendant's appeal on the award of interest should also be allowed. The interest that should be

paid to the 5th defendant by the plaintiff on the sum of RM665,000 was 1% per annum with effect from April 1983, which was the correct rate as this was stipulated by the revocation agreement. (paras 17, 18, 23, 24, 25 & 26)

Case(s) referred to:
TS Sambanthamurti v. Anthony J Dason & Ors [2000] 1 CLJ 657 CA ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 11

For the plaintiff - LH Chua; M/s LH Chua
For the 5th defendant - Alvin Tang; M/s Shook Lin & Bok

Reported by Suresh Nathan

JUDGMENT

Hishamudin Yunus J:

[1] This is an appeal by the plaintiff against the assessment of damages by the learned senior assistant registrar ('the registrar').At the conclusion of the hearing of the assessment of damages, the registrar made the following award against the plaintiff in favour of the 5th defendant:

(1) As damages for breach of contract, the plaintiff:

(a) shall pay to the 5th defendant a sum of RM265,000, being refund of a deposit paid to and received by the plaintiff; and

(b) shall pay to the 5th defendant a further sum of RM400,000, being the increment in value of the subject property.

(2) In accordance with s. 11 of the Civil Law Act 1956, interest is awarded at 6% per annum on the total sum (RM400,000+ RM265,000=RM665,000) of the above damages assessed from the date of assessment until the date of realization; and

(3) Costs of the assessment.

[2] The plaintiff is dissatisfied with the whole of the decision of the registrar on the assessment and has appealed to the judge in chambers against the whole decision.

[3] The 5th defendant, on their part, is dissatisfied against that part of the decision of the registrar pertaining to interest and has appealed to the judge in chambers in relation to this aspect of the decision.

[4] Before me, both appeals are heard together.

[5] I have dismissed the plaintiff's appeal with costs.

[6] But I have allowed the 5th defendant's appeal with costs.

[7] I have read the grounds of judgment of the registrar. I agree with his grounds of decision, except with regards to the rate of interest awarded to the 5th defendant. The grounds of judgment of the registrar can be found at encl. 68.

[8] It was the finding of the High Court (before Rahmah Hussain J (as she then was)) at the trial, and upheld on appeal by the Court of Appeal (see *TS Sambanthamurti v. Anthony J Dason & Ors and Another Appeal* [2000] 1 CLJ 657), that the plaintiff had breached a contract entered into between the plaintiff and the 5th defendant known as the 'revocation agreement'. The damages awarded by the registrar are in respect of losses suffered by the 5th defendant as a result of the breach of the revocation agreement by the plaintiff.

[9] In order to fully appreciate why the registrar made the aforesaid award, we have to understand the background. Way back in April 1981 the plaintiff entered into a sale and purchase agreement with the 5th defendant concerning the sale of a large piece of land in Kulim, Kedah; the plaintiff being the owner/vendor of the land, and the 5th defendant being the purchaser. The purchase price of the land as agreed was RM2,800,000. The 5th defendant, as purchaser, paid the plaintiff a deposit of RM265,000. Under the terms of the agreement, the balance of the purchase price was payable once the plaintiff/vendor had obtained from the relevant authorities the approvals for the land conversion, for the land subdivision, and for the layout plan. It is a term of the contract that these approvals must be obtained by the plaintiff within five months of the signing of the agreement, that is to say, on or before 28 September 1981. Time was the essence of the agreement. However, the plaintiff breached the agreement: they were unable to obtain the necessary approvals from the relevant

authorities within the stipulated time. The 5th defendant then asked for the return of the deposit, but the plaintiff was unable to refund the same.

[10] In order to resolve the impasse, the plaintiff/vendor and the 5th defendant/purchaser arrived at a compromise: on 5th February 1983 both parties entered into another written agreement, which the parties called the 'revocation agreement'. The terms of this revocation agreement are as follows. First, the earlier sale and purchase agreement between the plaintiff and the 5th defendant in respect of the Kulim land is revoked. Second, as a consideration for the revocation of the sale and purchase agreement, the plaintiff is to pay the 5th defendant a sum of RM100,000, upon the signing of the agreement. Third, the land was to be sold should there be a willing purchaser who is prepared to purchase the land. Fourth, upon the land being sold, the plaintiff is to pay the 5th defendant the following sums:

(a) a sum of RM400,000, being agreed as the loss suffered by the 5th defendant by reason of the breach of the sale and purchase agreement by the plaintiff; and

(b) a further sum of RM265,000, this amount being the deposit that was earlier paid by the 5th defendant to the plaintiff under the earlier sale and purchase agreement;

(c) interest of 1% per annum on the sum of RM665,000 from 1 April 1983 until the date of payment.

[11] However, the plaintiff breached the revocation agreement: there was a company by the name of Koperasi Belia Majujaya (M) Bhd that was willing to buy the land for RM3,300,000 but the plaintiff refused to sell the land to this company.

[12] The 5th defendant sued the plaintiff (by way of a counter-claim) for this breach of the revocation agreement. The 5th defendant succeeded in their claim before Rahmah Hussain at the High Court. The High Court Judge (Rahmah Hussain J) held that there was a breach of the revocation agreement by the plaintiff by reason of the refusal on the part of the plaintiff to sell the land to Koperasi Belia Majujaya; and ordered an assessment of damages. On appeal by the plaintiff to the Court of Appeal, this decision of the High Court was upheld by the Court of Appeal. Hence, there is this assessment of damages by the registrar.

[13] At the hearing of the assessment of damages, the 5th defendant did not adduce any evidence but relied purely on the evidence that had already been tendered by the defence witnesses before the High Court Judge during the trial of the case. Reference was made, in particular, to the evidence of the following witnesses:

(1) Mr. Vasantha Kumar Tharmalingam, a professional property valuer (DW2);

(2) the evidence of Mr. Vijaya Kumar, an advocate and solicitor with the legal firm Messrs Sri Ram & Co. (DW3); and

(3) the evidence of Mr. Raja Durai, a businessman (DW5)

[14] The plaintiff at the hearing of assessment of damages did not call any witness. The learned trial Judge found as a fact, based on the evidence of Mr. Vijaya Kumar, that the Koperasi Belia Majujaya was willing to purchase the said land at RM3,300,000. Mr. Vijaya Kumar testified that he was authorized by the Chairman of Koperasi Belia Majujaya to make an offer to purchase on behalf of Koperasi Belia Majujaya. This finding of fact by the trial judge was upheld by the Court of Appeal.

[15] Then there is also the evidence of DW2 who testified that he had valued the land and found it to fetch a market price of RM3.3 million.

[16] The learned counsel for the plaintiff argued before me that the registrar had erred in assessing the damages based on the revocation agreement. He contended that the assessment cannot be based on the revocation agreement because, according to learned counsel, the Court of Appeal had made a finding that the revocation agreement was invalid and unenforceable. The learned counsel for the plaintiff relies on the following words in the judgment of the Court of Appeal (in *TS Sambanthamurti v. Anthony J Dason*) which reads:

> It is clear to this Court that as the revocation agreement is no longer valid and enforceable … (emphasis added)

[17] In my judgment, there must have been a mistake here in the above words quoted by the learned counsel, in particular, the words 'revocation agreement'. The above words cannot be read in isolation but must be read in the context of the whole passage from which they are extracted. The whole passage reads:

> It is clear to this Court that as the **revocation agreement** is no longer valid and enforceable, **the fifth defendant is no longer the current purchaser thereof** and therefore by virtue of that fact the titles of the said land (if unencumbered) should be returned to the appellant. It was clearly established to us that the said title was with the first defendant for safekeeping. Mr. Anthony J Dason who attended in person told us the property was originally charged by the appellant to Nesa Cooperative at the time when the sale and purchase agreement was signed. The title was then made available to him when the chargees asked for its return and he eventually took out an interpleader summons and he was then holding the title as a stakeholder. After the revocation agreement was repudiated, the chargee requested for its return. Mr. Dason told the court the title was still with him and he was happy to hand it over to court's custody. This court then ordered that first defendant do deposit the title with senior assistant registrar of the court pending the outcome of the appeal by the chargee bank. (emphasis added.)

[18] In my judgment, judging from the tenor of the judgment as a whole, and in particular the whole of the passage that I have just quoted (with emphasis on the words 'the fifth defendant is no longer the current purchaser thereof'), what the Court of Appeal meant to refer to here is the sale and purchase agreement and not the revocation agreement. In other words, what the Court of Appeal intended to say here was:

> It is clear to this Court that as the [sale and purchase] agreement is no longer valid and enforceable, the fifth defendant is no longer the current purchaser thereof and therefore by virtue of that fact the titles of the said land (if unencumbered) should be returned to the appellant …

[19] Moreover, Rahmah Hussain J had made a finding that there was a breach of the revocation agreement and that finding was upheld by the Court of Appeal. This is what Abu Mansor JCA (as he then was) in delivering the judgment of the Court of Appeal said:

> In the course of argument, Mr. Porres Royan for the first and fifth defendants contended that the appellant had breached the revocation agreement by his refusal of the offer to purchase the said land by Koperasi Majujaya at the price of RM3.3m. The learned trial judge in her grounds of judgment at p. 14 dealt with this and she said:

> Thus by rejecting the offer the plaintiff has breached the revocation agreement and the fifth defendant is therefore entitled to claim from the plaintiff whatever sum is due under the agreement, namely sum of RM665,000 which is as claimed in para 4(1) and (2) of its counterclaim.

> As far as the appeal in respect of the appellant's statement of claim against all the respondents is concerned, we dismissed his appeal with costs. As to the appellant's against the fifth defendant in the counterclaim, we allowed the appeal to the extent of setting para (1)(B)(a) of the trial judge's order of 30 May 1995 as at p 42 of the record of appeal bahagian A. We also set aside para (1)(B)(c) in so far as the fifth defendant is concerned. We hereby confirm the learned trial judge's order in para (1)(B)(b) thereof. As for costs in the appellant's appeal against the fifth defendant, the appellant is awarded 2/3 of costs of the appeal.

[20] It must be noted from the above passage that para. (1)(B)(b) of Rahmah Hussain J's order was confirmed by the Court of Appeal. Now, this para. (1)(B)(b) of the trial judge's order states:

> (b) the Plaintiff herein do pay to the 5th Defendant herein damages for breach of agreement to be assessed by the Senior Assistant Registrar.

[21] The word 'agreement' in para. (1)(B)(b) above refers to the revocation agreement.

[22] Indeed, at the earlier part of the judgment of the Court of Appeal, the court said:

> We find the contention of the appellant that the sale and purchase agreement was tainted by fraud lacked merit. We cannot accept that it was so material and relevant to the appellant who owned the fifth defendant for if it was a matter that he was so concerned it was open to him to conduct a search and it would have been duly revealed who the directors were before he signed the sale and purchase agreement. *We agree with the finding and reasoning of the learned trial judge that both the sale and purchase agreement and the revocation agreement were valid.* (emphasis added.)

[23] With respect, it does not make sense to me for the Court of Appeal, on the one hand, to say that the revocation agreement is valid and to agree with Rahmah Hussain J's finding that there had been a breach of the revocation agreement by the plaintiff, and that there should be an assessment of damages in respect of

the breach; yet at the same time to say, on the other hand, that 'the revocation agreement is no longer valid and enforceable'. The Court of Appeal cannot be said to have indulged in self-contradiction. There must have been a slip of the pen by Abu Mansor JCA when writing the judgment of the Court of Appeal.

[24] As to the award of the sum of RM265,000, clearly the registrar was correct in law in awarding this sum to the 5th defendant. This sum was the deposit that had been paid by 5th defendant to the plaintiff under the sale and purchase agreement, which under the revocation agreement is to be refunded to the 5th defendant.

[25] As to the award of the next sum of RM400,000, this sum was also correctly awarded to the 5th defendant by the registrar; for this sum is also stipulated in revocation agreement as being the sum that the 5th defendant would be entitled to receive from the plaintiff had the land be sold to Koperasi Belia Majujaya at RM3,300,000. The 5th defendant's case is fortified by the evidence of DW2 who said that the market price of the land at the time that Koperasi Belia Majujaya offered to buy it was RM3.3 million.

[26] I allowed the 5th defendant's appeal on the award of interest. The interest that should be paid to the 5th defendant by the plaintiff on the sum of RM665,000 is 1 percent per annum with effect from 1 April 1983. I consider this as the correct rate as this rate is stipulated by the revocation agreement.

[Plaintiff's appeal dismissed with costs; 5th defendant's appeal allowed with costs.]